1994

State of Utah v. Tonya Vigil : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

-vs-

TONYA VIGIL,

Defendant/Appellant.

AMENDED APPEAL BRIEF

Case No. 940426CA

Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment and conviction for two counts of theft by deception, both second degree felonies, in violation of Utah Code Ann., §76-6-404 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Tyrone E. Medley, Judge, presiding.

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JURISDICTION

This is an appeal from convictions of theft by deception, both second degree felonies. Utah Code Ann., §78-2a-3(2)(f), provides this Court's jurisdiction over this case.

STATEMENT OF ISSUES

1. Did the trial court conduct an inadequate voir dire?

STANDARD OF REVIEW:

This Court reviews a trial court's performance of jury voir dire for abuse of discretion. State v. Ontiveros, 835 P.2d 201, 205 (Utah App. 1992). "Whether a trial court abused its discretion in conducting voir dire depends on whether, 'considering

the totality of the questioning, counsel was afforded an adequate opportunity to acquire the information necessary to evaluate [prospective jurors.]'" Id. (citation omitted; brackets by the Court).

The issue was preserved by trial counsels' pre-submitted voir dire questions, and objection to the trial court's failures to ask requested questions. (R.709,710,718,719,725).

1. Did the trial court give the jury an erroneous instruction?

STANDARD OF REVIEW:

The Court reviews this as a question of law, for correctness. Ontiveros, supra. The court reviews "jury instructions in their entirety and will affirm when the jury instructions taken as a whole fairly instruct the jury on the law applicable to the case." Id. (citation omitted).

This issue was preserved by trial counsels' objections. (R.1164-1171).

3. Did the trial court err in blocking the presentation of defense evidence and in denying jury instructions requested by the defense?

STANDARD OF REVIEW:

The jury instruction aspect of this issue is reviewed for correction of error. Ontiveros, supra. As to the evidence aspect

of this issue, the record must show a clear abuse of discretion. State v. Pena, 869 P.2d 932, 938 (Utah 1994).

The issue was preserved by trial counsels' objections to the trial court's refusal to instruct the jury, and by trial counsels' efforts to present the evidence. (R.1151-1158; 1164-1171).

4. Was trial counsel ineffective in failing to request proper defense instructions, and/or did the trial court commit plain error in failing to give these instructions?

STANDARD OF REVIEW:

Because the trial court was not presented the issue, this Court must determine whether trial counsel was ineffective as a matter of law. Salt Lake City v. Grotespas, 874 P.2d 136,138 (Utah App. 1994). Review of trial counsels' performance is to be "'highly deferential'" and is to avoid "'distorting effects of hindsight.'" Id. (citations omitted).

In assessing ineffective assistance, this Court should determine whether the errors below were both obvious and harmful. State v. Eldredge, 773 P.2d 29 (Utah), cert. denied, 110 S.Ct. 62 (1989). This Court has the discretion to dispense with the obviousness requirement where the error was harmful in retrospect, but may not have been readily apparent to the trial court and counsel. Id., 773 P.2d at 35 and n.7. See also State v. Verde,

770 P.2d 116,122 (Utah 1989) (applying plain error standard to failure to given jury instructions sua sponte). The issue was not raised below.

5. Did the trial court err in its interpretation of the statutes governing this case, in concluding that the facts alleged here could constitute theft by deception?

STANDARD OF REVIEW:

"The appropriate standard of review for a trial court's interpretation of statutory law is correction of error." State v. James, 819 P.2d 781,796 (Utah 1991).

This issue was properly preserved by trial counsels' motions to quash the bindover orders and motions to dismiss the case. (R.19-60; 183-233; 560; 1052-1053).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

The following statutory provision may be determinative in this appeal: Utah Code Ann. §76-7-203.

STATEMENT OF THE CASE

The State of Utah charged Tonya Vigil (hereinafter "defendant") with two counts of theft by deception. Kenneth Brown represented defendant in trial. (R.13; 175). The case was bound over to district court, and defendant entered a plea of not guilty

to all charges. (R.17; 181). Defendant moved to quash the bindover orders (R.19-69; 183-233; 560), and the trial court denied the motions. (R.82; 261; 582).

Defendant moved to sever the two counts in the two district court cases. The State opposed this motion (R.252-260), and moved to join both cases against defendant in a trial on similar cases filed against defendant's husband, Thomas M. Vigil. (R.75-81; 245-251). The trial court joined all counts and cases against both these defendants together for one trial. (R.261, 585-586).

The jury convicted defendant as charged. (R.393-394; 397).

The trial judge sentenced defendant to serve two concurrent terms one to fifteen years at the Utah State Prison, suspended the sentence and placed defendant on probation subject to a six-month jail term.

From this conviction, defendant filed a timely appeal. (R.531 and 476).

After the notice of appeal was filed, a conflict of interest caused Mr. Brown to withdraw as counsel, and Mary C. Corporon now represents Tonya Vigil on appeal.

STATEMENT OF FACTS

DEFENSE CASE

Thomas and Tonya Vigil were married and living with five

children in their home as of the summer of 1992. Tonya went to her physician for a tubal ligation and discovered she was pregnant. Because the Vigils were financially destitute, they decided to give up the expected child for adoption. The Vigils made arrangements to give up the unborn baby for adoption to three separate families, the Elizondos, the Bushmans, and the Hallidays. During the course of the transactions, all the prospective adoptive parents gave the Vigils money for expenses. The Vigils did not give up their child for adoption to the Elizondo couple because the Vigils had disagreements and difficulties with the attorney representing the Elizondos. The Vigils did not give up their child for adoption to the Bushman couple because of difficulties with Mr. Bushman, mainly because Mr. Bushman told them that he had decided not to adopt the child himself. The Vigils did not give up their child for adoption to the Hallidays because, after the child was born, they could not part with her. The Vigils kept their baby. They did not inform any of the couples when she was born, and did not inform any of the couples that they were receiving expense money from other couples. (R.1062-1151).

STATE CASE

Bushmans:

Rex Bushman was an adoption attorney whom Tonya Vigil called to arrange the adoption. When the Vigils met with him in person on

February 28, 1993, he drafted and they signed a document indicating that he would find a family to adopt their baby. He asked the Vigils if his own family might adopt their child, and they agreed. He offered to pay for medical expenses and they agreed. He drafted and they signed an agreement for the payment of maternity expenses on March 5, 1995. The agreement indicated that they would return the expense money in the event that the adoption did not go through. He also drafted and they signed a form purporting to waive any conflict of interest stemming from his dual roles as their attorney and an adoptive parent. (R.754-761).

About March 3, 1993, Mr. Vigil called Mr. Bushman twice, indicating the Vigils' need for living expenses of approximately $1,500. Mr. Bushman had agreed to pay $500 in living expenses, and then agreed in writing to pay them $1,000 after their consent to the adoption was final. Mr. Bushman wrote a check for $390 for their rent, and a check to Mrs. Vigil for $110. (R.761-766).

Mr. Bushman maintained contact with the Vigils, but had decided not to adopt the Vigil baby. Sometime after March 19, 1993, Mrs. Vigil told him the adoption was still on. He called again later and found that the telephone had been disconnected, and he called the police. The adoption never went through, and the Vigils never repaid Mr. Bushman the $500. (R.766-769).

Mr. Bushman testified that he would not have paid the Vigils

$500 if he had not intended to obtain the baby. When asked if he considered the money a gift or charitable donation, he indicated that he found that idea "preposterous." He also testified that he would not have given the Vigils the $500 if he had known that other people were paying the Vigils in anticipation of adopting the baby. (R.769).

The Elizandos:

The Elizondos were attempting to adopt a child through an attorney named John Giffen. Their legal contacts informed them that the Vigils had an interest in having them adopt their child, so Mr. Elizondo called Mrs. Vigil on the telephone in October of 1992, when she was living with her mother. After further telephone contact with Mrs. Vigil, Mr. Elizondo arranged to pay $500 a month for her pregnancy expenses through Mr. Giffen's office. He paid $1,200 to get Mrs. Vigil into an apartment in November of 1992, and paid a total of $4,300. John Giffen testified the Vigils received about $5,300. The Elizondos flew to Salt Lake City from their home in California to visit the Vigils in February. Mrs. Vigil told them the baby was due in March, and forms she filled out for Mr. Giffen specified March 27, 1993 as the due date. (R. 879-895; 927; 975-976).

Later in February, Thomas Vigil called Mr. Elizondo and asked him to change attorneys because Mr. Vigil was not happy with John

Giffen. The Vigils did not like the way the money was being managed, and wanted it to come directly to Mr. Vigil. John Giffen confirmed that Mr. Vigil had had disagreements with him because Mr. Vigil wanted more money and wanted the money sent to him. There was also a problem because Mr. Giffen's assistant did not obtain medication necessary to treat Mrs. Vigil. (R.889; 905-907; 914; 918; 954-955; 958; 1010).

Mr. Elizondo maintained contact with the Vigils in March of 1993, until their telephone was disconnected. He later learned through Mr. Giffen's assistant that the Vigils had had the baby on March 18, 1993, and had decided to keep her. (R.895-897, 908).

Mr. Elizondo testified that he knew that there was no guarantee that the adoption would go through, that he did not consider the money he paid to be a charitable contribution, that he would not have paid them had he known that others were paying them at the same time, and that he never got any money back from the Vigils. (R.897-898; 913).

He had a civil lawsuit pending against the Vigils, which was filed by Paul Halliday, as of the date of trial. (R.921).

The Hallidays:

Paul and Vicky Halliday were working through an attorney, Marilyn Fineshriber, to adopt a child. Mrs. Vigil had originally

contacted their attorney about the prospective adoption on March 3 or 4, and the Vigils met with the attorney on March 7 or 8, 1993. Mrs. Vigil said the prospective due date for the birth of the child was August 28, 1993. Mr. Halliday made arrangements to pay $900 in expenses to the Vigils on March 12, 1993, after Mrs. Vigil told the attorney on March 7, 1993, that the Vigils were about to be evicted, and another $600 on March 25 or 26, 1993, in response to Mr. Vigil's call to the attorney indicating that the Vigils' telephone had been disconnected and that they needed money to pay their utilities. The receipts for the checks to the Vigils from the law firm state that the payments were charitable donations. Mrs. Vigil told the attorney on March 23, 1993, that the Vigils were planning to go through with the adoption. The Hallidays did not adopt the Vigil baby. (R.803-810; 821-836; 860; 868).

Mr. Halliday testified that he did not consider the $1,500 a gift to the Vigils, that he was not repaid by the Vigils, and that he would not have paid the money had he known that they would not receive the baby or that other people were also trying to adopt the baby. (R.810-811).

Mr. Halliday admitted on cross-examination that his attorney had informed him that the $1,500 was a charitable contribution, and that the money did not guarantee the adoption would go through (R. 815). He testified that he had a civil suit pending against the

Vigils. (R.818).

Mr. Vigil called the Hallidays' attorney on April 6, 1993, and told her that they had not intended to defraud anyone, but had decided to keep the baby, and would pay back the money. He also told her that a California couple had just offered to pay their expenses, and that he had made no commitment to give the child up for adoption. (R. 867).

LEGAL ADVICE TO THE VIGILS

Marilyn Fineshriber, the Hallidays' attorney, testified that she told the Vigils the money from the Hallidays was a charitable contribution, and legally could not bind their consent to the adoption. (R.848-849; 864).

John Giffen, the attorney representing the Elizondos and the Vigils, informed all parties that the money from the Elizondos did not buy the consent to the adoption, but was considered a charitable contribution. He gave the Vigils a form detailing adoption-related crimes under California law, which indicated that it is a crime to receive pregnancy expenses with the intent to withhold consent to the adoption. He testified that in going over the form he drafted entitled "Pitfalls of Adoption" regarding various provisions of California law, he told the Vigils that it was illegal to accept money from other couples, and explained that Utah law is similar to California's, and counseled them about the

vulnerable emotional state of the prospective adoptive parents. (R.930-932; 992).

Mrs. Vigil testified that John Giffen did not go over the forms with them, or advise them about any legal issues surrounding adoption, but sent his non-law-trained assistant to bring the Vigils the forms. (R.1121-1122).

SUMMARY OF ARGUMENT

A new trial is required because the voir dire in the instant case did not provide trial counsel with adequate information with which to assess the prospective jurors. The trial court's failure to ask the jurors about their fairness and impartiality, about their independence in deliberations, and about the impact of their exposure to media reports concerning attempted adoptions, constituted an abuse of discretion.

The trial court erred in giving the jury an instruction which purported to carve out a theft by deception exception from the statute which mandates that all monies given to birth parents by prospective adoptive parents be charitable donations. The instruction was inconsistent with Utah statutes and cases, and was prejudicial to defendant.

The trial court erred in blocking defendant's presentation of her defense evidence pertinent to her motivation in seeking out

successive prospective adoptive couples. The court compounded the error by refusing her requested defense instructions which elucidated her motivation for seeking out multiple prospective adoptive couples.

Trial counsel and the trial court prejudiced defendant's defense by failing to give two jury instructions established by statute, which would have provided defenses to her actions.

The trial court erred in ruling that charitable contributions by prospective adoptive parents can be the object of theft by deception charges. This Court should resolve this issue by ordering the case dismissed.

ARGUMENT

POINT 1. THE INADEQUATE VOIR DIRE REQUIRES A NEW TRIAL.

A. TRIAL COURTS MUST CONDUCT ADEQUATE VOIR DIRE.

The state and federal constitutions require trial courts insure fair trials by conducting sufficient voir dire. E.g. State v. Bishop, 753 P.2d 439, 448 and nn. 1-6 (Utah 1988)(citing Article I, sections 7, 10 and 12 of the Utah constitution, and the Fifth and Sixth Amendments to the United States Constitution), reversed on other grounds, State v. Menzies, 889 P.2d 393 (Utah 1994). The Utah Supreme Court has exercised its supervisory power to reiterate to the trial courts that it is their responsibility to insure that

voir dire proceedings not only provide adequate information for the informed exercise of peremptory challenges, but also eliminate bias and prejudice from criminal trials. State v. James, 819 P.2d 781, 797-798 (Utah 1991). In James, the Court directed trial courts to go beyond the minimally adequate voir dire required by federal constitutional standards, to thoroughly detect and probe juror biases. Id. See also State v. Worthen, 765 P.2d 839, 844-45 (Utah 1988); State v. Ball, 685 P.2d 1055, 1058-1061 (Utah 1984).

"[T]he fairness of a trial may depend on the right of counsel to ask voir dire questions designed to discover attitudes and biases, both conscious and subconscious, even though they 'would not have supported a challenge for cause.' All that is necessary for a voir dire question to be appropriate is that it allow 'defense counsel to exercise peremptory challenges more intelligently.'" State v. Worthen, 765 P.2d 839, 845 (Utah 1988)(citation omitted).

Utah Code Ann. §77-1-6(1)(f) codifies the right to an impartial jury, and Utah Rule of Criminal Procedure, 18(e)(14), requires trial courts to conduct voir dire proceedings adequate to reveal juror bias. The rule provides that a juror should be removed for cause if voir dire indicates "that a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and

without prejudice to the substantial rights of the party challenging[.]"

Trial courts carry a heavy responsibility in conducting voir dire in criminal cases. Mu'Min v. Virginia, 114 L.Ed.2d 493, 501-510 (1991); State v. James, 819 P.2d 781, 797-98 (Utah 1991).

B. THE VOIR DIRE IN THIS CASE WAS INADEQUATE.

After the initial round of voir dire, the trial court held a hearing outside the jury's presence, wherein defense counsel asked the trial court to ask the following pre-submitted questions:

> 27. If, after hearing the evidence, you came to the conclusion that the prosecution had not proven the guilt of the accused beyond a reasonable doubt, and you found that a majority of the jurors believed the defendant was guilty, would you change your verdict only because you were in the minority?
>
> 28. Are there any of you who are not in such a fair and impartial state of mind that you would not be satisfied to have a juror possessing your mental state judge the evidence if you or your loved ones were on trial here? In other words, would you want someone with your state of mind sitting as a juror on a case if you were the defendant?

(R.709). The trial court declined to ask questions 27 and 28, because the court was of the opinion that he had already conducted sufficient voir dire. (R.710).

Evaluating the "totality of the questioning," State v. Sherard, 818 P.2d 554, 558 (Utah App.), cert. denied, 843 P.2d 516 (Utah 1992), this Court can see that the trial court abused its

discretion in failing to ask these two questions. The voir dire never addressed whether the prospective jurors felt they were generally fair and impartial, or whether they would maintain their independence in the deliberation process, or succumb to pressure from a majority.

Defense counsel also requested pre-submitted question 10, which stated:

> 10. Have any of you see[n] any recent television programs, or received other information, depicting attempted adoptions? What did you hear?

Counsel for co-defendant Mr. Vigil informed the court that two television programs concerning attempted or failed adoptions had aired approximately one month and one week prior to the trial. (R.710). He asked the court to inquire about exposure to the programs, and the court agreed to do so. (R.709; 710). Prospective juror Pepper had seen a program during the week prior to trial. (R.715). The trial court asked him no follow up questions, but he had already been stricken for cause.

Prospective juror Jerman had seen a show that winter. (R.716). When the court asked Jerman if that exposure to that information would prevent him from being fair and impartial, Mr. Jerman said that it would not. (R.716). Mr. Jerman had already been stricken for cause.

Prospective juror Wylie had seen a program somewhere within

six months prior to trial, and had read a magazine article about the subject. (R.715). The colloquy was as follows:

> THE COURT: Let me ask you this question, Ms. Wylie, As a result of the documentary or the article in the magazine, and considering the nature of today's case, would any of that information interfere with your responsibility to be fair and impartial?
> MS. WYLIE: No, not really.
> THE COURT: You are certain you could remain fair and impartial to both sides of this case?
> MS. WYLIE: I think, yes.
> THE COURT: Obviously, you use the word "think." Do you have a hesitation?
> MS. WYLIE: I don't remember the story in that detail, you know. I think I can listen impartially.

(R.715-716).

Prospective juror Reese said that she had seen a show called "Attempted Adoption," wherein a "child was up for adoption and then their minds were changed and the natural parents got the child back." (R.717). She answered "No," when the court asked, "Would any of that information interfere with your abilities to be fair and impartial to both sides of this lawsuit?" (R.717).

At an unrecorded bench conference prior to the parties' passing of the jurors for cause, defense counsel objected to the trial court's refusal to further interview jurors Wylie and Reese in chambers regarding what television programs they had seen and how they felt about them. (R.718, 725). Both Reese and Wylie served on the Vigils' jury. (R.719). (Trial counsel was under no obligation to remove them in order to preserve this issue. It was

sufficient to request additional voir dire, and to obtain a ruling. State v. Ontiveros, 835 P.2d 201, 204 n.1 (Utah App. 1992). The trial court opined that the totality of the questions to all prospective jurors was adequate. (R.726).

Trial counsel was correct in requesting further voir dire of the jurors. In State v. Boyatt, 854 P.2d 550 (Utah App.), cert. denied, 862 P.2d 1356 (1993), a case wherein the potential jurors had been victims of crimes similar to those at issue, this Court stated, "[T]he trial court must adequately probe a juror's potential bias when that juror's responses or other facts suggest a potential bias. The trial court does not abuse its discretion when, after sufficient questioning, the suggestion of bias has been dispelled." Id. at 552. This holding applies here, wherein two of the prospective jurors had heard media reports which may have biased them, and state they "think" they could be unbiased.

This Court has recognized the need for specific voir dire of prospective jurors in civil cases who have been exposed to similar media reports. In Doe v. Hafen, 772 P.2d 456 (Utah App. 1989); Barrett v. Peterson, 868 P.2d 96 (Utah App. 1993); and Evans v. Doty, 824 P.2d 460 (Utah App.), cert. denied, 836 P.2d 1383 (Utah 1991), this Court has explained that, once preliminary questioning establishes jurors have been exposed to "tort reform propaganda," or media focusing on insurance reforms, prejudice is established,

and the parties are entitled to more specific questioning to determine if jurors bear latent or deep-rooted biases as a result. Hafen, 772 P.2d at 458-459; Barrett, 868 P.2d at 99-101; Evans, 824 P.2d at 464-46. Given the interests at stake in a criminal case, trial courts should provide at least as much voir dire as they are required to provide in the civil arena. See Hafen at 458 n.2 (intimating that the scope of voir dire in criminal cases might need to exceed the scope of civil trial voir dire in order to safeguard the constitutional rights of criminal defendants).

When the trial court found that two of the prospective jurors had been exposed to programs focusing on similar cases, which the jurors remembered, under Hafen Barrett, and Evans, prejudice was established and the trial court should have asked more specific questions to determine if the prospective jurors bore latent or deep-rooted biases regarding the issues in the case. See id.

The trial court's perfunctory questions to prospective jurors Reese and Wylie about whether, in light of the media exposure, they felt that they could be fair and impartial, were inadequate. Juror Wylie never gave an unequivocal response to the trial court's question. Even if she had, the court should have asked more meaningful questions so that he and counsel could have assessed the impact of the media on Ms. Wylie and Ms. Reese.

Utah law has long recognized that trial courts may not simply

accept a juror's assessment of his or her ability to try a case fairly; where preliminary voir dire raises a question about the juror's ability to serve, it is incumbent upon the trial court to ask probing questions to determine if the juror bears latent biases which would impair the juror's performance. See State v. Woolley, 810 P.2d 440, 441 (Utah App.), cert. denied, 826 P.2d 651 (Utah 1991)(when prospective juror has been a victim of a crime similar to that at issue, an inference of bias arises, which is not rebutted by a juror's claim that he can be fair and impartial). See also State v. Jones, 734 P.2d 473, 475 (Utah 1987); State v. Hewitt, 689 P.2d 22, 25-27 (Utah 1984); State v. Brooks, 631 P.2d 878, 884 (Utah 1981); Jenkins v Parrish, 627 P.2d 533, 536 (Utah 1981).

As the Court stated in Evans v. Doty, 824 P.2d 460 (Utah App, 1991), "[I]t is not enough for a trial judge to ask questions merely to discover a potential juror's overt biases. The judge must also allow counsel the opportunity to hear responses to questions that may indicate hidden or subconscious attitudes. Without such an opportunity, the prospect of impaneling a fair and impartial jury is diminished." Id. at 462.

Reviewing the totality of the questioning, this Court can see that trial counsel was not afforded adequate information to assess the prospective jurors. Because the trial court thus abused his

discretion in conducting the voir dire, a new trial is in order. See State v. Ontiveros, 835 P.2d 201, 205 (Utah App. 1992).

In a related decision on appeal, State of Utah v. Thomas N. Vigil, Case No. 940614-CA in the above Court, filed July 5, 1996, this Court analyses the same jury voir dire and finds that the colloquy between the trial court and Wylie and Reese to be adequate. This Court finds that " . . . the trial court persevered in its line of questioning to ensure that the two would be fair and impartial." With all due respect, defendant here asserts that the court did not persevere in questioning enough with Ms. Wylie to determine if she should be stricken for cause. As noted in the State v. Vigil, supra, Ms. Wylie, in response to a question about whether media information would interfere with her responsibility to be fair and impartial, responded "No, not really." She clearly qualified her answer. When pressed again about her ability to be impartial, she again qualified her answer by saying "I think, yes." When pressed yet another third time about her qualified answers, she said "I think I can listen impartially." (emphasis added) Ms. Wylie never once gave an unequivocal answer to an inquiry about media information and its impact on her fairness and impartiality. Trial counsel properly preserved this issue by objecting to the trial judge's refusal to question Wylie further. This left trial counsel unable to ask that Ms. Wylie be stricken for cause because

her answers were equivocal, and left them uncertain how to exercise their peremptory challenges, because her answers were unclear. The court refused to clarify this. The trial court clearly did abuse its discretion in refusing to question Ms. Wylie further.

POINT 2. THE ERRONEOUS JURY INSTRUCTION REQUIRES A NEW TRIAL.

A. TRIAL COURTS MUST INSTRUCT JURIES CORRECTLY.

The law governing jury instructions is that "beyond the substantive scope, correctness and clarity of the jury instructions, their precise wording and specificity is left to the sound discretion of the trial court. However, said instructions must not incorrectly or misleadingly state material rules of law." State v. Sherard, 818 P.2d 554, 560 (Utah App.) cert. denied, 843 P.2d 516 (Utah 1992).

B. THE TRIAL COURT ERRED IN INSTRUCTING DEFENDANT'S JURY.

Trial counsel objected to the portion emphasized below in the trial court's jury instruction 28, (R.1170), which provides:

INSTRUCTION NO. 28

> Under Utah law, any person, agency, or corporation may pay maternity expenses, related medical or hospital, and necessary living expenses of the mother preceding and during confinement. However, that act of paying is by law considered an act of charity and may not be made for

> the purpose of inducing the mother, parent or legal guardian to place the child for adoption, consent to an adoption, or cooperate in the completion of an adoption.
>
> Whether a person consents to the adoption of his or her child is a personal and private act of that person and may not be bought or bartered for under the law. A natural parent at any time may choose not to consent to an adoption. By so choosing, that person does not subject himself or herself to criminal responsibility unless you find from the evidence and beyond a reasonable doubt each and every element of the offense of Theft by Deception, as charged in the Information have been established. (Emphasis added).

The problem with the emphasized portion of instruction 28 is that it carves out a theft by deception exception from the statute which mandates that all monies given by prospective adoptive parents to birth mothers are charitable contributions, which does not exist in Utah law. Utah Code Ann. §76-7-203 states:

> Any person, while having custody, care, control, or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any child for and in consideration of the payment of money or other thing of value is guilty of a felony of the third degree. However, this section does not prohibit any person, agency, or corporation from paying the actual and reasonable legal expenses, maternity expenses, related medical or hospital, and necessary living expenses of the mother preceding and during confinement as an act of charity, so long as payment is not made for the purpose of inducing the mother, parent, or legal guardian to place the child for adoption, consent to an adoption, or cooperate in the completion of an adoption.

There can be no theft by deception in the context of an adoption, because any money given to the birth mother is a charitable contribution, as a matter of law, and cannot be consideration for a promised consent to the adoption. Utah Code

Ann. §76-7-203.

Reliance is an essential element of theft by deception. State v. Jones, 657 P.2d 1263 (Utah 1982). Even if the alleged victims were deceived, there was no theft by deception unless they relied on the Vigils' statements in parting with their money. Id. Because the birth parents' consent cannot be bought under Utah Code Ann. §76-7-203 under any circumstances, the prospective adoptive parents legally could not rely on the Vigils to consent to the adoption.

Birth parents cannot deceive, because the object of their representations, the baby, cannot be sold, and thus has no pecuniary significance. See Utah Code Ann. §76-6-405(2) ("Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance[.]").

Any birth parent aware of Utah Code Ann. §76-7-203 would have a defense to a charge of theft by deception under Utah Code Ann. §76-6-402(3), which provides, "It is a defense under this part that the actor: (a) Acted under an honest claim of right to the property or service involved; or (b) Acted in the honest belief that he had the right to obtain or exercise control over the property or service as he did[.]"

Under the plain language of Utah law, the conduct of a birth mother here cannot constitute theft by deception. In the event

that the legislature wishes to make conduct similar to that alleged here a crime, it may do so by adopting a statute which makes it a crime to accept such charitable contributions if there is no present intent to complete the adoption. In grafting a theft by deception exception into the charitable donation statute, the trial court invaded the province of the legislature, and violated the doctrine of separation of powers. See generally Sutherland, Statutory Construction, section 46.03 (citations omitted); Constitution of Utah, Article V section 1 (separation of powers provision). The trial court has further chilled all good faith efforts to care for expectant birth mothers and their good faith efforts to place babies for adoption.

The last sentence of Jury Instruction 28 misstates the law governing theft by deception, and the court erred in giving it to the jury. The instruction is the crux of the State's case, and the jury's receipt of it was highly prejudicial to defendant.

POINT 3. DEFENDANT SHOULD BE ALLOWED TO PRESENT HER DEFENSE IN A NEW TRIAL.

A. TRIAL COURTS MUST ALLOW THE PRESENTATION OF DEFENSE EVIDENCE.

Every criminal defendant has a federal constitutional right to present a complete defense to criminal charges against her. See Crane v. Kentucky, 476 U.S. 683 (1985)("Whether rooted directly in

the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process of confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' ... We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard.")(citations omitted). The Constitution of Utah provides parallel protection. An essential aspect of due process guaranteed by Article I, Section 7 of the Utah Constitution is the "fair opportunity to submit evidence." Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945). "[T]he defendant's right to present all competent evidence in his defense is a right guaranteed by the due process clause of our State Constitution, Art. I, Sec. 7[.]" State v. Harding, 635 P.2d 33, 34 (Utah 1981). Article I, Section 12, of the Utah Constitution guarantees numerous rights to an accused. It states:

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. (Emphasis added).

B. TRIAL COURTS MUST INSTRUCT THE JURY ON DEFENSE THEORIES.

In instructing the jury, trial courts are governed by the requirement that "the defendant has a right to have his or her theory of the case presented to the jury in a clear and comprehensible manner." State v. Ontiveros, 835 P.2d 201, 205 (Utah App. 1992)(citation omitted).

C. THE TRIAL COURT ERRED IN EXCLUDING DEFENDANT'S EVIDENCE.

Trial counsel for Mr. Vigil called Roland Oliver to testify about services offered by adoption agencies. Upon the state's objection to the relevance of his testimony, both defense counsel argued that the evidence was relevant because, had the Vigils gone through adoption agencies, rather than through attorneys Bushman and Giffen, who provided inadequate services, the Vigils would not have proceeded as they did, in continuing to seek out prospective adoptive couples, and accepting expense monies from three different couples. The trial court sustained the relevance objection, and also excluded the evidence under Rule 403, finding that its admission might confuse and mislead the jury. (R.1151-1158).

In this ruling, the trial court forbade both defendants from presenting their defense. The constitutional provisions prevail, regardless of the Rules of Evidence. The United States Constitution, Article VI (supremacy clause); Constitution of Utah, Article I, Section 26 (provisions of Utah Constitution are

mandatory and prohibitory, unless expressly declared otherwise). The trial court's ruling was also erroneous under the Rules of Evidence.

Utah Rule of Evidence 402, provides for the admission of "[a]ll relevant evidence ... except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. ..." Relevant evidence is defined by Utah Rule of Evidence 401, as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." [emphasis added]

Defendants' evidence regarding how adoptions should be conducted, in contrast to the performance of attorneys Bushman and Giffen, goes directly to the absence of the Vigils' intent to deceive anyone. By explaining proper adoption procedures through Mr. Oliver, defendant sought to demonstrate that the Vigils' behavior was caused by the inadequate performance of attorneys Bushman and Giffen, rather than motivated by any intent to deceive.

The trial court's exclusion order was also based on Utah Rule of Evidence 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,

> waste of time, or needless presentation of cumulative evidence.

Utah law interpreting this rule demonstrates the error of the trial court's reasoning. Under Utah Rule of Evidence 403, courts are to presume that relevant evidence is admissible unless the evidence has "an unusual propensity to unfairly prejudice, inflame or mislead the jury." State v. Dunn, 850 P.2d 1201, 1221-22 (Utah 1993). In the event that the evidence fell within such a class, the proponent of the evidence would then have the burden to show the unusual probative value of the evidence. Id.

The testimony of Mr. Oliver defendants sought to introduce would not have an unusual propensity to "unfairly prejudice, inflame or mislead the jury," and its admission should be presumed.

Assuming that the burden were on defendant to demonstrate the unusual probative value of the evidence, the burden is met. The State's proof of deception hinged on the fact that there were multiple prospective couples involved. The prosecutor told the jury that, had there been only one couple who tried to adopt the Vigil's baby, the State would not have prosecuted the Vigils. (R.1175; 1308). The theory of the defense was that it was the inadequate performance of attorneys Giffen and Bush, rather than an intent to deceive, that motivated that Vigils to become involved with multiple prospective adopting couples. (R.1297-1301).

Evidence was presented regarding the inadequate services

provided by Giffen and Bushman. However, the vast majority of this evidence required legal training to appreciate. Mr. Giffin vacillated in his testimony regarding whether he represented the Vigils or the adoptive couple. (R.929; 941; Defendant's Exhibit 9). He was clearly in a conflict of interest. Mr. Bushman was initially contacted to find an adoptive family, but he negotiating to adopt the Vigil baby himself, and then received documents authorizing him to find another couple to adopt the baby, and in fact negotiated with another couple to adopt the Vigil baby. (R.756-762; 772-783; 792). Both attorneys had the Vigils sign vague forms purporting to waive conflicts of interest. (Defendant's Exhibit 10; State's Exhibit 3). Mr. Bushman provided support money for the Vigils out of his attorney trust account, and drafted an agreement whereby the Vigils would have to return the funds if they did not consent to the adoption, in clear violation of the law. (R.779-780). Mr. Bushman, who advertised himself as an adoption attorney, indicated that the idea that the money to the birth parents was a charitable contribution was "preposterous" thus showing an utter lack of knowledge of the law. (R.769-770). Mr. Giffen acknowledged having had difficulties with the Vigils, stemming from the way in which he was dispensing the funds, and because his assistant failed to obtain timely medical care for Mrs. Vigil. (R.938-939; 954).

Had the jurors been allowed to hear about proper adoption procedures from Roland Oliver, this would have clarified the deficiencies in the attorneys' performances, which the jurors may not have fully appreciated. The evidence would have supported the Vigils' defense that their motivation in seeking out successive couples was a lack of satisfaction with the attorneys, rather than a desire to deceive.

The trial court's concerns that the evidence might confuse or mislead the jury underestimate the intelligence of juries and the importance of giving the jury the information relevant to deciding the facts. State v. Teuscher, 883 P.2d 922 (Utah App. 1994), demonstrates the error in the trial court's analysis. Teuscher was charged with homicide for the death of a child which occurred while the child was in Teuscher's day care facility. At trial, her attorney sought to exclude evidence of other uncharged instances of child abuse by Teucher. This Court held that under Utah Rule of Evidence 404(b), proof of the other crimes was entirely appropriate, inasmuch as the homicide charge to be determined by the jury required the jury's assessment of intent and absence of mistake.

In Teuscher, this Court held that the evidence was also admissible under Rule 403. While evidence of uncharged crimes is normally considered to be presumptively prejudicial, [State v.

Saunders, 699 P.2d 738, 741 (Utah 1985)], this Court found that the probative value of the testimony outweighed the danger of prejudice. Teuscher at 928.

The evidence at issue in Teuscher had a far greater danger of misleading or confusing the jury than did Mr. Oliver's testimony here. Unlike the prosecution in Teuscher, the defendant had constitutional rights to present her defense, so the admission of this evidence is more strongly required than in Teuscher.

Cross-examination of the state's witnesses was inadequate to present the defense because Mr. Oliver's testimony went beyond the possible scope of cross-examination of those witnesses, and because defendant had the right to call witnesses for her defense. Cf. State v. Templin, 805 P.2d 182 (Utah 1990)(conviction reversed for ineffective assistance of trial counsel in part because counsel failed to call witnesses to bolster the defendant's testimony).

Because Roland Oliver's testimony was relevant, and because its probative value exceeded its prejudicial effect, the trial court should have admitted the evidence. While cross-examination of the State's witnesses did present evidence of the attorneys' shortcomings, a lay jury likely would not appreciate the significance of the evidence centering on legal technicalities, such as the serious conflicts of interest. Given the scarcity of other evidence available to establish the Vigils' defense to the

intent element of the charges, the trial court's order excluding Roland Oliver's testimony was prejudicial.

In its opinion in State v. Vigil, supra, this Court contends that defendant's argument here is " . . . that this evidence would have shown that, under different circumstances, [defendant] would not have conducted himself as he did, . . . " Defendant here asserts, with all due respect, that this Court has not considered the full potential impact of Oliver's testimony. Defendant's claim here is not that, under different circumstances, she would have acted differently. Specific intent is an element of the crimes charged against her. Defendant contends that she did not intent to deceive anyone, as the State has claimed. She contends that the damaging evidence about her working with three prospective adoptive couples and taking money from all three is, in reality, explainable as conduct consistent with a different mental state other than the intent to deceive. Roland Oliver's testimony would have further established that she was being dealt with improperly by attorneys in a conflict of interest, without being correctly advised by an attorney of her rights and responsibilities in the circumstances. Because his testimony went to the issue of intent, Oliver should have been allowed as a witness.

D. THE TRIAL COURT ERRED IN FAILING TO GIVE REQUESTED DEFENSE INSTRUCTIONS.

Over trial counsels' objection, the trial court refused to give the jury requested defense Instructions 8 and 9, which quote portions of Rules 1.7 and 1.8 of the Utah Rules of Professional Conduct. (R.1169). The requested instructions were as follow:

INSTRUCTION NO. 8

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(R.295).

INSTRUCTION NO. 9

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client[;]
>
> (2) the client is given a reasonable

> opportunity to seek the advi[c]e of independent counsel in the transaction[;] and (3) the client consents in writing thereto.

(R.296).

Defendant was entitled to have the jury instructed on her theory of the defense. Requested instructions 8 and 9 would have assisted in elucidating the shortcomings in the performances of the attorneys, Giffen and Bushman, and thus in explaining why the Vigils sought out successive prospective adoptive couples. Particularly in light of the trial court's refusal to allow the testimony of Roland Oliver to explain acceptable norms in adoptions, the absence of the requested jury instructions pertaining to the attorneys' deficient performances was prejudicial.

Again, in the related appeal, State v. Vigil, supra, the court finds this analysis unpersuasive. However, in this related appeal, this Court fails to note that the crux of the entire case was whether the Vigils intended, at the moment they took the money, not to go forward with the adoption. Intent is always an element which must be proved by extrinsic facts, since we can never see inside the workings of a human mind at a particular moment. The extrinsic facts which were so damaging in this case were defendants negotiation for adoption with three separate couples (and three separate attorneys) and her taking money from three separate

couples. Trial counsel properly attempted to explain this to the jury by showing a benign explanation for this apparently damning evidence. Trial counsel attempted to do so by demonstrating that defendant had counsel in conflict in the adoption case behaving unethically and/or incompetently.

This is not a situation where defendant attempted to cloud the issue by placing blame on the attorneys (as this Court seems to say in State v. Vigil opinion). Rather, this is a case where defendant attempted to explain that she had a non-culpable mental state, and that her conduct which tended to indicate an intent to deceive could otherwise be explained.

The trial court failed to permit her to pursue this theory of defense by failing to give the two requested jury instructions quoting Rules 1.7 and 1.8 of the Utah Rules of Professional Conduct. A jury could not be expected to know, in a vacuum and without jury instructions, that it is a conflict of interest for an attorney to represent both sides in an adoption, or that any of the other conduct of counsel might be improper. Thus, the jury instructions were highly important to defendant's theory of the case, and failure to give these instructions was harmful error.

POINT 4. THE ABSENCE OF PROPER DEFENSE INSTRUCTIONS REQUIRES A NEW TRIAL.

A. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON TWO ASPECTS OF DEFENDANT'S DEFENSE.

Since Utah law mandates that monies given to birth mothers by prospective adoptive parents are charitable contributions, and attorneys Giffen and Fineshriber advised the Vigils that the money from the prospective adoptive couples was legally considered to be a charitable contribution, the Vigils were entitled to an instruction embodying the law in Utah Code Ann. §76-6-402. It provides:

> .... (3) It is a defense under this part that the actor:
> (a) Acted under an honest claim of right to the property or service involved; or
> (b) Acted in the honest belief that he had the right to obtain or exercise control over the property or service as he did; or
> (c) Obtained or exercised control over the property or service honestly believing that the owner, if present, would have consented.

While John Giffen testified that he told the Vigils it was illegal to accept money from more than one couple, this discussion occurred in going over a form embodying California Law. (See State's Exhibit 10). Mr. Giffen testified that he told the Vigils that Utah law was similar to California's. Defendant denied the Vigils ever discussed any such legal concept with Mr. Giffen.

The jury also should have been instructed that "[T]heft by deception does not occur ... when there is only falsity as to matters having no pecuniary significance[.]" Utah Code Ann. §76-6-405(2).

It was the State's theory that the Vigils deceived the

Bushmans, the Hallidays, and the Elizondos by falsely representing their intent to give up a baby for adoption. (R.7-8; 171-172). For instance, the probable cause statement originally filed in case number 931901605 provides: "The Defendants received money from three different couples for the baby and yet never delivered the child to anyone." (R. 172). As a matter of law, these representations had no pecuniary significance. Utah Code Ann. §76-7-203.

B. THIS COURT SHOULD ADDRESS THE ERRORS.

While trial counsel did not request these defense instructions, this Court should nonetheless address and rectify the errors, as plain error and due to ineffective assistance of counsel.

Under the plain error doctrine, it is appropriate for an appellate court to address an issue raised for the first time on appeal if the error should have been obvious to the trial court and was prejudicial. State v. Eldredge, 773 P.2d 29 (Utah), cert. denied, 110 S.Ct. 62 (1989). Some errors will be addressed on appeal even if they should not have been plain to the trial court, if, in hindsight, the appellate Court recognizes a high level of prejudice stemming from the error. Id., 773 P.2d at 35 and n.8. The plain error standard is not to be applied in an overly

technical fashion; the rule is designed to balance the need for procedural regularity against the need for fairness. State v. Verde, 770 P.2d 116, 122 n.12 (Utah 1989).

The two statutes at issue here should have been obvious to the trial court and trial counsel. The statute limiting theft by deception to representations of pecuniary significance is the same statute which defines theft by deception. The statute setting forth the good faith defense to the charges is located under the same part of the Utah Code. The language of the statutes is plain and unambiguous, and directly supports the defense that both attorneys were attempting to assert through motions to quash the bindovers, to dismiss, and arguments to the jury.

The absence of the defense instructions was prejudicial. There were no true defense instructions given. There is a substantial likelihood of a more favorable outcome, had the proper instructions been given. As it was, the jury had before it no evidence and no instructions (because the trial judge failed to give both) explaining that defendant's conduct might be interpreted in view of something other than deceptive intent. Clearly, if the jury had had any of this theory of the case before it, it could have found in favor of defendant. The failure of counsel to request these defense instructions is, therefore, highly prejudicial.

This Court should, therefore, address the absence of the instructions under the plain error doctrine. See State v. Brooks, 868 P.2d 818, 822 (Utah App.)(discussing common standard for reversal on allegations of plain error and ineffective assistance of counsel), cert. granted, 883 P.2d 1359 (Utah 1994).

> In order to bring a successful ineffective assistance of counsel claim pursuant to the Sixth Amendment, a defendant must show [1] that trial counsel's performance was deficient in that it 'fell below an objective standard or reasonableness,' and [2] that the deficient performance prejudiced the outcome of the trial.

(at page 822). The prejudice prong is established if there is a "'reasonable probability' that, but for counsel's errors, the result would have been different." Salt Lake City v. Grotepas, 874 P.2d 136, 138 (Utah App. 1994)(citation omitted).

In considering a claim of ineffective assistance of counsel on direct appeal, the record must be sufficient for this Court to decide the issue, and the defendant must be represented by counsel different from trial counsel. Id. at 822 n4.

Just as the need for the defense instructions should have been obvious to the trial court, the need also should have been obvious to trial counsel. The failure to request the instructions cannot be based upon any conceivable tactical decision, and fell below objective standards of reasonableness. Given the absence of any true defense instructions, and given the evidence in this case, trial counsel's failure to request the instructions was clearly

prejudicial. See State v. Moritzky, 771 P.2d 688, 692 (Utah App. 1989)(conviction reversed for ineffective assistance of counsel, who requested defense instruction that failed to incorporate recent statute beneficial to the defense; court found no conceivable tactical basis for the omission); Salt Lake City v. Grotepas, 874 P.2d 136 (Utah App. 1994)(conviction reversed because trial counsel failed to request defense instruction authorized by the Code).

POINT 5. AS A MATTER OF LAW, CHARITABLE CONTRIBUTIONS CANNOT BE THE OBJECT OF THEFT BY DECEPTION.

Charitable contributions may not be the object of theft by deception, as a matter of law.

Theft by deception is defined by Utah Code Ann. §76-6-405. By the plain language of the statute, theft by deception does not occur when the matters which are the subject of the deception have no pecuniary significance. As noted above, under Utah Code Ann. §76-7-203, consent to adopt can have no pecuniary significance.

An element of the offense of theft by deception is reliance by the victims. State v. Jones, 657 P.2d 1263 (Utah 1982). Because the victims in the context of an adoption cannot rely on the birth parents to consent to the adoption, as a matter of law, (Utah Code Ann. §76-7-203), there is no reliance causing them to part with their money, and theft by deception cannot occur. Jones.

The statute characterizing monies from prospective adoptive parents as charitable contributions, Utah Code Ann. §76-7-203, would also provide a basis for the statutory good faith defenses to theft by deception provided in Utah Code Ann. §76-6-402(3), cited above.

Because the facts here cannot constitute the crime of theft by deception under Utah law, this Court must dismiss this case.

POINT 6. THE STATUTORY SCHEME AS APPLIED TO DEFENDANT IS VOID FOR VAGUENESS.

Defendant, pursuant to Article 1, Section 7 of the Utah State Constitution is entitled to due process of law. Further, pursuant to the United States Constitution, the defendant is also entitled to due process of law.

If a law or statutory scheme is so vague that it does not provide adequate notice to a citizen of prohibited conduct which may give rise to a criminal prosecution, then the statute is void for vagueness, in violation of guarantees of due process. Salt Lake City v. Savage, 541 P.2d 1035 (Utah 1975), cert. den. 425 U.S. 915 (1976).

In this particular case, defendant is advised by one statute of the State of Utah that monies given to her as a birth mother in anticipation of adoption are a charitable contribution, and under no set of circumstances can bind her to the adoption. The logical

extension of this is that no prospective adoptive parent can rely upon a promise to consent to an adoption.

On the other hand, defendant has been prosecuted for theft by deception for receiving money under exactly these circumstances. This whole statutory scheme, as applied to defendant in this case, is void for vagueness because it does not put a citizen on notice adequately of potential criminal conduct.

If the legislature wanted to make this clear it could easily adopt a law similar to the California statute about which defendant was advised making it illegal to accept money from a prospective adoptive parent without present intent to consent to the adoption. The legislature could also make this clear by adopting a law making it illegal to accept money from more than one set of prospective adoptive parents at a time. These laws do not exit in Utah, however. Since they do not, defendant has been prosecuted under a unconstitutionally vague statutory schemes.

It should be noted that the opinion in State v. Vigil, supra, does not address this issue for vagueness, and is, therefore, not dispositive.

CONCLUSION

Defendant requests that this case be dismissed. In the alternative, she seeks a new trial, wherein the voir dire is adequate, the jury is instructed properly, and she is allowed to present her full defense.

RESPECTFULLY SUBMITTED this 6 day of August, 1996.

CORPORON & WILLIAMS

Mary C. Corporon by M. Jay Jolley

MARY C. CORPORON
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the defendant/appellant herein, and that I caused the foregoing BRIEF OF APPELLANT to be served upon plaintiff/appellee by placing 2 true and correct copies of the same in an envelope addressed to:

JAN GRAHAM
Utah State Attorney General
Attorney for Plaintiff/Appellee
236 State Capitol
Salt Lake City, Utah 84114

and depositing the same, sealed, with first-class postage pre-paid thereon, in the United States mail at Salt Lake City, Utah on the 6 day of August, 1996.

CORPORON & WILLIAMS

Mary C. Corporon by M. Jay Jette

MARY C. CORPORON
Attorney for Defendant/Appellant

APPENDIX

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee,	OPINION (For Official Publication)
v.	Case No. 940614-CA
Thomas M. Vigil, Defendant and Appellant.	F I L E D (July 5, 1996)

Third District, Salt Lake County
The Honorable Tyrone E. Medley

Attorneys: Patrick L. Anderson, Salt Lake City, for Appellant
Jan Graham and Todd A. Utzinger, Salt Lake City, for Appellee

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Before Judges Davis, Billings, and Wilkins.

DAVIS, Associate Presiding Judge:

Defendant Thomas M. Vigil appeals a jury verdict convicting him of three counts of theft by deception, one third degree felony and two second degree felonies, in violation of Utah Code Ann. § 76-6-405 (1995). We affirm.

I. FACTS

Defendant is appealing from a jury verdict; thus we recite the facts in a light most favorable to the jury's verdict, "but present conflicting evidence to the extent necessary to clarify the issues raised on appeal." State v. Winward, 909 P.2d 909, 910 (Utah App. 1995).

A. The Elizondos

In early November 1992, John Giffen, an adoption attorney in St. George, Utah, received a phone call from defendant's wife, Tonya Vigil, a co-defendant in this case. Tonya informed Giffen that she was expecting a child March 27, 1993, and that she and

defendant, the child's father, wished to place the baby for adoption. Giffen explained to Tonya the procedure for a private adoption and offered to have Saunya Schuchart, his paralegal who resided in Salt Lake City where the Vigil's were living, meet with her and show her several "resumes"[1] of potential adoptive families.

Schuchart met with defendant and his wife at a local restaurant, provided them with the resumes, and explained the adoption process. The Vigils chose Frank and Stephanie Elizondo, a California couple, from the resumes as the prospective adoptive parents. At this meeting, defendant asked Schuchart whether the Vigils could receive financial assistance for living and medical expenses during the pregnancy. Schuchart assured him that they could.

After the Vigils had chosen the Elizondos as the adoptive parents, Frank Elizondo contacted Tonya by phone. The two conversed to get acquainted. At this time, Frank agreed to send Giffen money to assist the Vigils with their living expenses. Because neither defendant nor Tonya were working, the Elizondos agreed to pay for their living expenses until defendant found employment. At that time, the financial assistance would be reduced by the amount defendant was earning. Giffen would deposit the money received from Frank into a trust account, which would then be used to assist the Vigils when needed. Either defendant or Tonya would call Schuchart and request money; she would then contact Giffen. Giffen would transfer Frank's money into a Salt Lake City bank account from which Schuchart could draw the necessary amount.[2] Frank initially forwarded $1200 on November 5th to help defendant and Tonya get into an apartment.

After the initial meeting, Schuchart again met with the Vigils when defendant called requesting that she assist them in locating an apartment. An apartment was found and Schuchart gave defendant two checks, presumably to cover rent. However, Tonya called Schuchart one or two days later and told her defendant had left and taken the checks without paying for the apartment. Schuchart stopped payment on the checks.

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1. The "resumes" are pictures and biographical sketches of the couples attempting to adopt a child.

2. All checks were made payable to Tonya, not defendant.

Schuchart did not hear from the Vigils for approximately two and a half weeks. When Tonya finally made contact with Schuchart, Schuchart again helped the two find an apartment. Because of the Vigils' poor credit history, the landlord required Giffen to personally guarantee rent for four months.

Giffen met with the Vigils in either late November or early December. Along with a medical record release form, Giffen had the Vigils sign a "Waiver of Consent of Interest." Giffen explained that because he represents both the Elizondos and the Vigils, there was a potential conflict of interest and, therefore, he needed to get their permission to represent both parties. Giffen also discussed a document with the Vigils entitled "The Illegality Pitfalls in Adoptions." The document informs birth parents what they can and cannot do regarding the adoption. Giffen advised the Vigils that receiving money from adoptive parents for pregnancy related expenses did not mean that consent for the adoption had to be given. Additionally, Giffen told them it was illegal to take money from an adoptive couple if they did not intend to go through with the adoption and it was illegal for the birth parents to take money from more than one prospective adoptive couple. Although the document covered California law, Giffen told the Vigils that Utah had the same type of laws. Both defendant and Tonya signed this document.

In the middle of December, Giffen received a phone call from defendant, who requested that Giffen pay him the rent for January early so that he and Tonya could buy "Christmas presents, and clothes and things." Defendant assured Giffen he would take care of the January rent himself if Giffen would release the funds. Based on this conversation, Giffen sent $375 on December 11th and $125 on December 14th to cover the holiday expenses. Notwithstanding defendant's promise, the Vigils failed to pay January's rent, which was ultimately paid a second time by the Elizondos.

During the middle of February 1993, the Elizondos visited the Vigils in Salt Lake City. Schuchart picked the Elizondos up at the airport and dropped them off at the Vigils' apartment. The four went to lunch and after some sightseeing, Tonya suggested they visit the hospital maternity ward where she anticipated the baby would be born. Tonya also gave Stephanie a baby blanket which a friend had made for Tonya's baby. Defendant then dropped the Elizondos off at the airport. Both Frank and Tonya testified the visit went well.

After this visit, Frank received a phone call from defendant, who requested that Frank start sending the money directly to defendant, bypassing Giffen. Defendant also requested that Frank change attorneys, stating he was not happy with Giffen because defendant wanted to control the money and Giffen did not allow it. Frank told defendant he was bound contractually to Giffen and could not change attorneys. Subsequent to this conversation, defendant called Frank again and requested $1500 to buy a car. Frank told defendant that he did not have that kind of money and, in any event, the money had to go through Giffen and had to be for pregnancy related items. Defendant became angry and told Frank not to tell Giffen about the request.

Toward the end of February, Giffen received another phone call from defendant. Defendant again requested that the March rent be sent early and that it be sent directly to defendant, as opposed to the landlord. Giffen resisted and defendant hung up on him. Defendant called again the next day, insisting that he needed the money. Giffen relented and had Schuchart write a check to Tonya, which was done on February 24th. A few short weeks after this transaction took place, defendant again called Giffen stating that he needed money for the March rent.[3] After Giffen reminded defendant that they had already paid rent for March, defendant replied that he spent the money on his car. When Giffen told defendant he did not think they could pay the rent again, defendant got angry and hung up on Giffen. Giffen spoke with Frank, who again sent money to cover the rent for March.

Frank continued to call the Vigils numerous times a week to check on Tonya's status. Although he was able to talk to Tonya a few times, the majority of the conversations were with defendant, who told Frank that Tonya was resting. Toward the middle of March, Frank began calling almost every day, anxious about the baby's arrival. Frank had discussed with the Vigils the arrangements for picking up the baby; when Tonya went into labor, either she or defendant was to call Frank. As soon as Frank received word, he and Stephanie would take the next flight into Salt Lake City and meet the Vigils at the hospital.

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3. Giffen also received a phone call from the landlord complaining that the March rent had not been paid.

At one point, Frank was unable to reach either defendant or Tonya for a full day.[4] Anticipating that Tonya had gone into labor, Frank called the hospital, where he talked to defendant. Defendant assured Frank that Tonya was only there for a routine check-up. Frank called again the following Monday and spoke to defendant. Defendant told Frank that Tonya was resting. When Frank asked defendant when Tonya's next doctor appointment was, defendant replied that it was Tuesday. Frank phoned again on Tuesday and defendant stated that the appointment had been moved to Wednesday. When Frank called on Wednesday, he discovered that the Vigils' phone had been disconnected.

The last conversation Giffen had with defendant was on or about March 18th. Defendant called Giffen and told him that they had not paid their utility bills for several months and, as a result, the utility companies were threatening to turn them off. Giffen had Schuchart confirm this with the utility companies, and the Elizondos ultimately paid for the phone and electric bill. Schuchart issued a check to the Vigils on March 18th for $150 to cover groceries. On the same day, Schuchart wrote a check to the phone company, stuck the check in the envelope with the bill, sealing it. Schuchart also deposited $250 with the landlord on March 19th for a cleaning fee deposit.

After delivering this money to the Vigils, Schuchart received a phone call from Frank, who asked that she investigate why the phone had been disconnected. Schuchart, knowing that she had just paid the phone bill, went over to the apartment on the Thursday following Frank's last phone call to the Vigils, where defendant let her in. After approximately 20 minutes, defendant brought out a newborn baby girl and introduced her as Alexandria. Defendant informed Schuchart that he and Tonya had decided to keep the baby. When Schuchart asked when the baby was born, defendant said that she was born two days ago.[5] After learning this, Schuchart informed Frank. The Elizondos had paid

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4. The date and/or the day of the week is unclear.

5. The baby was born on March 18, 1993.

approximately $4300[6] toward the Vigils' living expenses during Tonya's pregnancy.

B. The Bushmans

Rex Bushman, an attorney who occasionally assists with adoptions, received a phone call from Tonya asking if Bushman was an adoption attorney. Tonya made an appointment with Bushman and, on February 24, 1993, the Vigils met with him at his office. The Vigils expressed their desire to find a couple to adopt their unborn child. Bushman replied that he and his wife would like to adopt a baby. Although they already had four children, they wished to have more and were unable to. Both defendant and Tonya stated they were amenable to this idea. The Vigils did not inform Bushman that they were receiving money from the Elizondos or that they had been working with Giffen.

At this initial meeting, Bushman had the Vigils sign an agreement stating that Bushman would find a suitable family to adopt the baby. Additionally, because the Vigils had said they were unable to pay for the medical expenses concerning the birth of the child, Bushman offered to pay the costs associated therewith.

The three met again on March 5th at Bushman's office. At this time, two more agreements were entered into. The first concerned an agreement that if the adoption did not go through, the Vigils would reimburse Bushman the expenses he had paid them. The second document was a "Waiver of Conflict of Interest." Perceiving a potential conflict because he was one of the adopting parents and also the attorney representing the Vigils, Bushman explained this fact to the Vigils and had them sign the waiver.

Prior to the March 5th meeting, Bushman received a call from defendant stating that he and Tonya needed some assistance with living expenses. Bushman requested that defendant determine how much he needed and call him back. Defendant did so, informing

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6. The Elizondos sent $1200 on November 5th, 1992, approximately $1000 in December for January's rent, $375 for rent and $50 for clothes on February 1st, $100 for utilities on February 18th, $500 for rent and other expenses on February 24th, $500 for rent and utilities on March 8th, $50 for clothing on or about March 10th, $150 for food and $82.24 for the phone bill on March 18th, and $250 for the cleaning deposit on March 19th.

Bushman that they needed $1500 to cover rent, utilities, and groceries.

When the Vigils met with Bushman on March 5th, he had prepared another document reflecting the parties' agreement that he was giving them $500 for living expenses[7] and would give them a balance of $1000 after the baby was born and the Vigils gave their consent for the adoption.

Bushman remained in contact with the Vigils after the March 5th meeting, expecting the baby to be born soon. On or after March 19th, Bushman called the Vigils and spoke with Tonya. Tonya assured Bushman at this time that the adoption would still proceed as agreed, never revealing that the baby had been born on March 18th or that they had decided to keep the baby. When Bushman tried to contact the Vigils again, he discovered that their phone had been disconnected.

C. The Hallidays

Marilyn Fineshriber, an attorney who has a limited practice in the adoption area, received a phone call from Tonya on either March 3rd or 4th of 1993. Tonya asked Fineshriber general questions regarding the adoption procedure and stated that she was expecting and was interested in placing her baby for adoption. Tonya made an appointment with Fineshriber to discuss the matter further.

The parties met on or about March 7th. They discussed the type of adoptive family with whom the Vigils were interested in placing their baby, the financial aid this family may be able to give the Vigils, and the Vigils' medical background. Fineshriber was told that the baby was due March 28th. Neither defendant nor Tonya mentioned to Fineshriber that they were receiving money from two other couples in connection with the baby's adoption.

After the initial meeting, Fineshriber spoke with Paul and Vicki Halliday concerning their interest in adopting the Vigils' baby. After the Hallidays expressed a desire to adopt the baby, Fineshriber informed the Vigils, who agreed to the adoption. The Hallidays gave the Vigils $900 on March 12th to help them with

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7. Bushman gave them two checks; one for $390 for rent and another for $110 for utilities and/or groceries. This was the third check the Vigils received for their March rent.

living expenses[8] and agreed to pay them $600 in April after the baby was born. Both defendant and Tonya picked up the check at Fineshriber's office.

After March 12th, Fineshriber spoke on the phone with both defendant and Tonya several times concerning how Tonya was feeling, her due date, and doctor visits. Fineshriber spoke with Tonya on March 23rd, and at this point Tonya did not inform Fineshriber that the baby had been born, but said only that the adoption would go forward as scheduled.

On March 25th, defendant contacted Fineshriber and told her that they needed more money because the phone had been disconnected and they were behind in paying their other utilities. Fineshriber asked defendant if they still planned to proceed with the adoption because that was the only way the money would be available. Defendant assured her that they were, but did not mention that the baby had been born. Fineshriber spoke with the Hallidays, who agreed to give the Vigils an additional $600. Defendant picked up this check on March 26th.

After defendant picked up the check on March 26th, Fineshriber attempted to contact the Vigils, but was unable to because their phone had been disconnected. Fineshriber did not speak with the Vigils again until the end of March or first of April, when defendant called and told Fineshriber that they had decided not to go through with the adoption but that they had not intended to deceive anyone. At this time, defendant told Fineshriber that they had been receiving money from the Elizondos.

In August 1993, defendant was charged by information on three counts of theft by deception, in violation of Utah Code Ann. § 76-6-405 (1995). A trial was held in April 1994.

Tonya testified to the events surrounding the adoption. Although she was satisfied with the Elizondos as prospective parents, Tonya testified that she became dissatisfied with Giffen and Schuchart. Tonya stated that she wanted the Elizondos to have the baby, but because they could not switch attorneys, she decided she could not go through with the adoption. This decision was made shortly after the Elizondos visited Salt Lake City. Tonya did not inform the Elizondos, Giffen, or Schuchart

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8. The Vigils had told Fineshriber that because they were unable to afford their March rent, they were about to be evicted.

of this decision. Furthermore, even though she had decided not to go through with the adoption with the Elizondos, Tonya testified that they continued to solicit funds from them.

Tonya stated that after she decided she was not going to continue the adoptive relationship with the Elizondos, she looked in the yellow pages for another adoption attorney. Although she agreed with Bushman's testimony that they had agreed to let Bushman adopt their baby, she stated that he later changed his mind and said he would find a family after the baby was born. Dissatisfied with this arrangement, Tonya went looking for another attorney.[9]

Tonya then spoke with Fineshriber regarding the possible adoption and ultimately agreed to have the Hallidays adopt the baby. Although Tonya testified that she was prepared to let the Hallidays adopt the baby, after the baby was born on March 18th, she decided she could not give the baby up for adoption. Tonya stated that she did not talk to any of the adoptive parents or attorneys after the baby was born and did not call any of them to inform them of the birth. When asked why she did not return the money received from Fineshriber after the baby was born, Tonya replied, "I didn't have a phone and I just had a baby and I just know I didn't."

The jury convicted defendant on all three counts. Defendant appeals.

II. ISSUES

Defendant raises numerous issues on appeal: whether (1) the trial court erred by concluding that theft by deception occurs in an adoption context; (2) the trial court adequately conducted voir dire; (3) the trial court erred by excluding defendant's evidence; (4) the trial court erred by refusing to give two of defendant's proposed instructions to the jury; and (5) defendant's trial counsel was ineffective by failing to request a jury instruction regarding possible statutory defenses to theft by deception or, if we determine that defendant's trial counsel was not ineffective, whether the trial court committed plain error by not submitting the instructions to the jury sua

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9. However, Tonya testified that she did not learn of Bushman's change of heart until their second meeting, which was March 5th. Tonya called Fineshriber on either March 3rd or 4th.

sponte. Defendant does not challenge the sufficiency of the evidence.

III. ANALYSIS

A. Theft By Deception in the Adoption Context

We begin our analysis by addressing defendant's claim on appeal that theft by deception, as codified at Utah Code Ann. § 76-6-405 (1995), cannot, as a matter of law, occur in adoption proceedings. Because theft by deception cannot occur in an adoption setting, defendant argues, the trial court erroneously instructed the jury on that issue. Whether the trial court properly determined and instructed the jury that theft by deception can occur in adoption settings are questions of law, which we review for correctness, giving the trial court no particular deference. State v. Ontiveros, 835 P.2d 201, 205 (Utah App. 1992).

Defendant's argument is premised on the juxtaposition of the statutory language for theft by deception and payment of adoption expenses. Theft by deception is statutorily defined as follows:

> (1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.
> (2) Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance
> . . . .

Utah Code Ann. § 76-6-405 (1995).[10]

Section 76-7-203, which forbids the sale of children but permits the payment of pregnancy-related expenses, provides:

> Any person, while having custody, care, control, or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any child for and in

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10. The jury instructions numbered 20, 22, and 24 set out the elements of theft by deception. The statutory definition of deception was set out in instruction number 26.

> consideration of the payment of money or other thing of value is guilty of a felony of the third degree. However, this section does not prohibit any person, agency, or corporation from paying the actual and reasonable legal expenses, maternity expenses, related medical or hospital, and necessary living expenses of the mother preceding and during confinement as an act of charity, so long as payment is not made for the purpose of inducing the mother, parent, or legal guardian to place the child for adoption, consent to an adoption, or cooperate in the completion of an adoption.

Id. § 76-7-203 (1995).

Defendant first argues that because the money given to the birth parents is considered a charitable contribution pursuant to section 76-7-203, and not consideration for the birth parents' promise to place the child for adoption, there can be no reliance, an essential element of theft by deception, by the prospective adoptive parents which would induce them to part with their money. Secondly, according to defendant, as a matter of law "[t]he birth parents cannot purvey any deception, because the object of their representations, the baby, cannot be sold, and thus has no pecuniary significance." Furthermore, since the funds given the birth parents are charitable contributions, they similarly have no pecuniary significance. We find defendant's arguments unpersuasive.

The statutory definition of deception is found at section 76-6-401(5) of the Utah Code which, in pertinent part, provides,

> (5) "Deception" occurs when a person intentionally:
>
> (a) Creates or confirms by words or conduct an impression of . . . fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or
>
> . . . .
>
> (e) Promises performance that is likely to affect the judgment of another in the

> transaction, which performance the actor does not intend to perform or knows will not be performed; provided however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

Id. § 76-6-401(5) (1995).

This court has previously enumerated three separate components of the deception element:

> (1) that defendant's acts satisfied the statutory definition of deception, (2) that the deception occurred contemporaneously with the transaction in question, and (3) that the victim relied upon the deception, at least to some extent, in parting with property.

State v. LeFevre, 825 P.2d 681, 685 (Utah App.), cert. denied, 843 P.2d 1042 (Utah 1992).

Defendant is correct in stating that prospective adoptive couples cannot be guaranteed that the birth parents will give up the baby for adoption when they agree to pay for expenses, because any funds given to the birth parents cannot be used to induce them into consenting to the adoption, but can only, by law, be considered a charitable contribution. See Utah Code Ann. § 76-7-203 (1995); cf. State v. Lakey, 659 P.2d 1061, 1063 (Utah 1983) ("an unfulfilled promise of future performance will not suffice as a false representation of fact"). However, defendant's claim that adoptive parents cannot rely on the birth parents' present intent to place the baby for adoption, even though legally revocable in the future, is misplaced.[11] To the contrary, "'[t]he [statement of future conduct] is regarded as a representation of a present intention to perform. Hence, such a [statement], made by one not intending to perform operates as a misrepresentation--a misrepresentation of the speaker's state of

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11. Defendant's claim is also contradictory to the position he took at trial. Defendant proposed an instruction which essentially stated that accepting money from prospective adoptive parents does not "subject [defendant] to criminal responsibility unless . . . [defendant] never had the intention of consenting to the adoption of the child." (Emphasis added.)

mind, at the time, and is actionable as a misrepresentation of "fact."'" Conder v. A.L. Williams & Assocs., 739 P.2d 634, 640 (Utah App. 1987) (citation omitted);[12] see also, Lakey, 659 P.2d at 1064 (stating section 76-6-401(5) "specifies circumstances in which a promise of future performance can be an element of the crime" of theft by deception). Thus, the adoptive parents are entitled to rely on the birth parents' representations of their present intent to place the baby for adoption, even though this decision is revocable. If, at the time they obtained funds from the prospective adoptive parents, the birth parents did not intend to place the baby for adoption, they fall within the definition of deception, because the promised performance--to give the baby up for adoption--which the birth parents knew to be false at the time they made the promise, affected the judgment of the adoptive parents when they decided to pay expenses to the birth parents. Quite clearly, prospective adoptive parents would not part with their money knowing that, at the time the money is paid, the birth parents do not intend to give the baby up for adoption.

Defendant also claims that because the child is the object of his alleged misrepresentations, and by law a baby cannot be sold, any funds given to the birth parents are considered charitable contributions. Therefore, defendant asserts the representations have no pecuniary significance, see Utah Code Ann. § 76-6-405 (1995), and defendant cannot be found guilty of theft by deception as a matter of law. Defendant's argument is meritless. Although the child is the "bait" used, the false representations of the birth parents regarding their present intent to place the child for adoption have substantial pecuniary significance: the resulting financial support from the prospective adoptive parents, whether characterized as a charitable contribution or not.

Finally, it is important to note that section 76-7-203 prohibits the payment of money to induce the "mother, parent, or legal guardian to place the child for adoption." Utah Code Ann. § 76-7-203 (1995) (emphasis added). Thus, there is no conflict between sections 76-7-203 and 76-6-405 where, as here, the inducement was the false representation made by the "parents" to the prospective adoptive parents. Thus, the outcome defendant urges, to allow birth parents to collect money from unsuspecting potential adoptive parents based on their false representations,

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12. Although Conder was a civil fraud case, we find the analysis to be persuasive in the criminal theft by deception context.

is absurd. Birth parents would be legally allowed to falsely induce persons who are trying to adopt into paying their medical expenses, living expenses, and maternity expenses. This is certainly not the result contemplated by section 76-7-203.

Accordingly, we hold the trial court did not err in concluding that theft by deception can occur in an adoption setting and, therefore, properly instructed the jury on this issue.

B. Voir Dire

Defendant challenges two aspects of the trial court's voir dire. Defendant first claims the trial court erred in refusing to ask two questions proposed by defendant. Secondly, defendant claims the trial court committed error in refusing to conduct further voir dire of two potential jurors when they acknowledged exposure to media regarding failed adoptions.

We review defendant's challenge to the trial court's voir dire for an abuse of discretion. Barrett v. Peterson, 868 P.2d 96, 98 (Utah App. 1993). Although the trial court is afforded broad discretion during voir dire, the "'discretion must be exercised in favor of allowing discovery of biases or prejudice in prospective jurors.'" Id. (quoting State v. Hall, 797 P.2d 470, 472 (Utah App.), cert. denied, 804 P.2d 1232 (Utah 1990)). We will not disturb "a trial court's discretionary rejection of voir dire questions" unless the trial court abused its discretion and the abuse "'rose to the level of reversible error.'" Id. (quoting Hall, 797 P.2d at 472). Reversible error occurs when, after reviewing the totality of the questioning, we conclude that trial counsel was not given "'"an adequate opportunity to gain the information necessary to evaluate jurors."'" Id. (quoting Evans v. Doty, 824 P.2d 460, 462 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992) (quoting State v. Bishop, 753 P.2d 439, 448 (Utah 1988))). There are two purposes behind voir dire. The process first allows trial counsel to discover any biases an individual juror may have which would support a challenge for cause. Evans, 824 P.2d at 462. Voir dire also allows counsel to gather sufficient information to allow them to intelligently exercise a peremptory challenge. Id.

After the trial court had completed the first round of voir dire, counsel was given the opportunity to state their objections and request further questions. Defendant requested that the trial court ask his proposed questions numbered twenty-seven and twenty-eight. Question twenty-seven stated:

> If, after hearing the evidence you came to the conclusion that the prosecution had not proven the guilt of the accused beyond a reasonable doubt, and you found that a majority of the jurors believed the defendant was guilty, would you change your verdict only because you were in the minority?

Question twenty-eight stated:

> Are there any of you who are not in such a fair and impartial state of mind that you would not be satisfied to have a juror possessing your mental state judge the evidence if you or your loved ones were on trial here? In other words, would you want someone with your state of mind sitting as a juror on a case if you were the defendant?

The trial court refused to ask the proposed questions, stating "the Court is satisfied that it has covered that matter in substance and the questions have been put to the panel."

Defendant claims that, considering the "'totality of the questioning,' . . . this Court can see that the trial court abused its discretion in failing to ask these two questions, because voir dire never addressed whether the prospective jurors felt that they were generally fair and impartial, and whether they would maintain their independence in the deliberation process, or succumb to pressure from a majority." However, defendant has not claimed the trial court's refusal to ask questions twenty-seven and twenty-eight denied him "'an adequate opportunity to gain the information necessary to evaluate [the] jurors,'" Barrett, 868 P.2d at 98 (citation omitted), or prevented him from either exercising a peremptory challenge or discerning any bias on behalf of a potential juror supporting a for-cause challenge. See Evans, 824 P.2d at 462. Defendant merely asserts the trial court abused its discretion by not putting the question to the prospective jurors. Without any analysis on the issue, we fail to see the basis of defendant's contention.[13] It is well settled that an appellate court is not

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13. In his reply brief, defendant argues the legal authority cited in the introductory section to his voir dire argument fulfilled his briefing obligation. However, citing cases regarding the general law of voir dire does not form the basis of (continued...)

"'a depository in which the appealing party may dump the burden of argument and research.'" State v. Bishop, 753 P.2d 439, 450 (Utah 1988) (citation omitted); see also Utah R. App. P. 24(a)(9) ("[t]he argument shall contain the contentions and reasons of the appellant with respect to the issues presented") (emphasis added). Thus, even if defendant's argument had merit, because defendant did not clearly analyze the issue, we decline to address it on appeal.

Defendant next argues the trial court abused its discretion when it failed to further question two jurors who said they had been exposed to media coverage in response to the following question: "Have any of you see[n] any recent television programs, or received other information, depicting attempted adoptions? What did you hear?" After the question was posed to the potential jurors, several raised their hands. Two potential jurors, Wylie and Reese, answered "yes" to the question and ultimately served on the jury.

The colloquy between Wylie and the trial court was as follows:

> The Court: . . . And Ms. Wylie, what program was it?
>
> Ms. Wylie: I don't know. Just a documentary.
>
> The Court: How long ago was that?
>
> Ms. Wylie: Within six months and then in the Ladies Home Journal I think there was an article too.
>
> The Court: Do you recall the subject matter of the documentary or the article in the Ladies Home Journal?
>
> Ms. Wylie: I just know its adoption and then they changed their mind.

(...continued)
a legal argument sufficient to put this court on notice of the grounds of a party's complaint. See Utah R. App. P. 24(a)(9) ("[t]he argument shall contain the contentions and reasons of the appellant with respect to the issues presented") (emphasis added).

The Court: Was that the subject matter of those issues?

Ms. Wylie: Uh-huh.

The Court: Let me ask you this question, Ms. Wylie. As a result of the documentary or the article in the magazine, and considering the nature of today's case, would any of that information interfere with your responsibility to be fair and impartial?

Ms. Wylie: No, not really.

The Court: You are certain you could remain fair and impartial to both sides of this story?

Ms. Wylie: I think, yes.

The Court: Obviously, you use the word "think." Do you have a hesitation?

Ms. Wylie: I don't remember the story in that detail, you know. I think I can listen impartially.

The following dialogue occurred between the trial court and Reese:

Ms. Reese: . . . I watched a television program documentary within the last three months "Attempted Adoption."

The Court: Do you remember the thrust or major points of the program you saw?

Ms. Reese: The major thing was that the child was up for adoption and then their minds were changed and the natural parents got the child back.

The Court: Would any of that information interfere with your abilities to be fair and impartial to both sides of this lawsuit, Ms. Reese?

Ms. Reese: No.

Defendant's counsel objected to the trial court's refusal to question jurors Reese and Wylie further, stating, "I felt that we needed to question them further regarding what the program was they saw and how they felt about it." The court, however, was "of the opinion that the totality of the questions put to all of the panel members, as well as those two panel members in particular, was appropriate and sufficient." We agree.

Not only was the basis of defendant's objection covered in the colloquy between the court and Reese and Wylie, but the trial court persevered in its line of questioning to ensure that the two would be fair and impartial. This taken together with other voir dire questions[14] asked of the potential jurors gave defendant "'"an adequate opportunity to gain the information necessary to evaluate jurors."'" Barrett, 868 P.2d at 98 (citations omitted). Accordingly, the trial court did not abuse its discretion in refusing to further question these two jurors.

C. Defense Witness

Defendant claims the trial court abused its discretion by excluding the testimony of his defense witness, Roland Oliver. Oliver's testimony was relevant, defendant argues, because it would have shown that Giffen and Bushman provided incompetent adoption services to defendant and his wife and, therefore, caused defendant's behavior. The trial court excluded Oliver's evidence as irrelevant under Rule 402 of the Utah Rules of Evidence and, in the alternative, as having the tendency to mislead and/or confuse the jury under Rule 403 of the Utah Rules of Evidence.[15]

Rule 402 provides that "[a]ll relevant evidence is admissible." Utah R. Evid. 402. Rule 401 of the Utah Rules of

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14. Other voir dire questions posed to the potential jurors included whether they had been victims of theft related crimes or whether they had any experience with adoption proceedings.

15. While defendant attempts to advance a constitutional argument regarding the exclusion of Oliver's testimony, he did not do so before the trial court. "Accordingly, we limit our analysis to the Utah Rules of Evidence implicated by [defendant's] arguments to the trial court." State v. Harrison, 805 P.2d 769, 780 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991).

Evidence provides: "'Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Utah R. Evid. 401.

A trial court is accorded broad discretion in determining whether proffered evidence is relevant, and we will disturb that determination only if the trial court has abused that discretion. State v. Harrison, 805 P.2d 769, 780 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991).

We agree with the trial court that Oliver's testimony was irrelevant to the issues before the court. Defendant's trial counsel advised the court that Oliver would have testified

> that adoption agencies, because they are certified by the state and required to do these things, perform certain services to adopting parents and to mothers who wish to place their children for adoption. We feel that had some of these procedures existed in this case, that the problems that occurred here would not have happened.

Defendant's argument that this evidence would have shown that, under different circumstances, he would not have conducted himself as he did, is without merit. What is relevant to the issues at hand is whether defendant, under the facts of the case, intended to obtain the three couples' money by falsely claiming that he intended to give his unborn child up for adoption. It is wholly irrelevant what defendant "may" have done under different circumstances and, as the State correctly points out, purely speculative. This is especially true given the fact that adoptions through a state licensed adoption agency have an entirely different set of procedures in place than those done through a private attorney. While the procedures Oliver was prepared to testify to may well be "proper adoption procedures" through a state licensed agency, this is not relevant to whether the procedures followed by Giffen or Bushman in the private adoption arena were proper or defendant's intent at the time he obtained money from the victims. Accordingly, the trial court did not abuse its discretion in determining that Oliver's testimony was irrelevant under Rule 402.

Even if we were to conclude that Oliver's testimony was relevant and therefore admissible under Rule 402, the trial court did not abuse its discretion by excluding the testimony under

Rule 403. Rule 403 provides, in pertinent part, that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury." Utah R. Evid. 403. "If the evidence has an unusually strong propensity to . . . mislead a jury, we require a showing of unusual probative value before it is admissible under rule 403." State v. Troyer, 910 P.2d 1182, 1191 (Utah 1995). "The trial court has 'considerable freedom . . . to make [Rule 403] decisions which appellate judges might not make themselves ab initio but will not reverse.'" State v. Blubaugh, 904 P.2d 688, 699 (Utah App. 1995), cert. denied, 913 P.2d 749 (Utah 1996) (quoting State v. Pena, 869 P.2d 932, 937-38 (Utah 1994)). This court will not reverse a trial court's Rule 403 determination absent an abuse of discretion. Troyer, 910 P.2d at 1191; Blubaugh, 904 P.2d at 699. A trial court abuses its discretion if its Rule 403 ruling is "'beyond the limits of reasonability.'" Troyer, 910 P.2d at 1191 (quoting State v. Dunn, 850 P.2d 1201, 1221 (Utah 1993)); accord Blubaugh, 904 P.2d at 699.

Here the proposed testimony clearly had a strong propensity to confuse and/or mislead the jury. Emphasizing what defendant characterizes as misdoings by the attorneys based on wholly dissimilar procedures in a state licensed adoption agency only clouds the real issue before the court--defendant's intent to obtain the victims' money by deception. Additionally, defendant has failed to show this court that dissimilar procedures between a state licensed adoption agency and a private adoption attorney have an unusual probative value, thereby outweighing the strong propensity of the evidence to confuse or mislead the jury. Thus, the trial court's decision to exclude the evidence under Rule 403 was not "'beyond the limits of reasonability,'" see Troyer, 910 P.2d at 1191 (citation omitted), and we affirm it on appeal.

D. Failure to Give Requested Instructions

Defendant contends the trial court erred in refusing to submit to the jury two instructions proposed by defense counsel. We review the trial court's failure to give requested jury instructions for correctness, granting the trial court no particular deference in its determination. Ong Int'l U.S.A. Inc. v. 11th Ave. Corp., 850 P.2d 447, 452 (Utah 1993); Anderson v. Sharp, 899 P.2d 1245, 1248 (Utah App.), cert. denied, 910 P.2d 426 (Utah 1995).

Defendant submitted proposed instructions numbered eight and nine which quote portions of Rules 1.7 and 1.8 of the Utah Rules

of Professional Conduct. On appeal and in support of his claim that the trial court erred in refusing to give the proposed jury instructions, defendant merely states that these instructions "would have assisted defense counsel in elucidating the shortcomings in the performance of the attorneys Giffen and Bushman, and thus in explaining why the Vigils sought out successive prospective adoptive couples." There is no further analysis, insufficient citation to legal authorities, and no citation to the record upon which defendant relies. It is well established that this court will decline to consider an argument that a party has failed to adequately brief. See State v. Price, 909 P.2d 256, 263 (Utah App. 1995), cert. denied, 916 P.2d 909 (Utah 1996). Because of the inadequate analysis, we decline to address defendant's claim on appeal.

E. Failure to Request/Give Statutory Defense Instructions

Notwithstanding the competence of trial counsel and the trial court's alleged errors with regard to the foregoing issues, defendant contends that his trial counsel was ineffective because he failed to request jury instructions setting out the statutory defenses to theft by deception. Because trial counsel did not request such instructions, defendant asserts his trial counsel was ineffective and/or the trial court committed plain error.

Section 76-6-402 of the Utah Code provides three defenses to theft by deception:

> (3) It is a defense under this part that the actor:
>
> (a) Acted under an honest claim of right to the property or service involved; or
>
> (b) Acted in the honest belief that he had the right to obtain or exercise control over the property or service as he did; or
>
> (c) Obtained or exercised control over the property or service honestly believing that the owner, if present, would have consented.

Utah Code Ann. § 76-6-402 (1995).

Section 76-6-405 provides:

> (2) Theft by deception does not occur, however, when there is only falsity as to

> matters having no pecuniary significance
> . . . .

Id. § 76-6-405(2).

It is well established that in order to succeed on an ineffective assistance of counsel claim,

> a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.

State v. Smith, 909 P.2d 236, 243 (Utah 1995). If this court determines that "it is easier to dispose of the issue on" the second element enumerated above, then we may do so without reaching the first element. Price, 909 P.2d at 264.

Defendant's claim of ineffective assistance of counsel fails because he made no attempt to show this court how the outcome of the trial would have been different had the instructions been submitted to the jury. Defendant simply states, "Given the absence of any true defense instructions, and given the evidence in this case, trial counsel's failure to request the instructions was also prejudicial." This is insufficient to show that had trial counsel submitted the instructions, the outcome of defendant's trial would have been different and does not merit a reversal of defendant's conviction. See State v. Archuleta, 747 P.2d 1019, 1023 (Utah 1987) (defendant's ineffective assistance of counsel claim failed based on defendant's failure to show prejudice).

Alternatively, defendant argues that even if failure to request the instructions did not amount to ineffective assistance of counsel, it was plain error for the trial court not to have submitted the above defenses to the jury. In order to demonstrate plain error, defendant must show (1) error, (2) that the error should have been obvious to the trial court, and (3) that the error was harmful. State v. Dunn, 850 P.2d 1201, 1208 (Utah 1993); State v. Tenney, 913 P.2d 750, 756 (Utah App. 1996).

Defendant argues that because the statutory language in sections 76-6-402 and 76-6-405 is clear and unambiguous it was error to fail to instruct on the defenses and that error "should

have been plain to the trial court." Even if we assume it was error to fail to provide the jury the statutory defenses to theft by deception, this failure was far from obvious. Defendant's trial counsel pursued a consistent defense theory throughout the trial proceedings, namely, that defendant's conduct was based on the attorneys' misdeeds.[16] Indeed, during an argument to the trial court, defense counsel stated, "What we will argue to the jury is that there was no deliberate attempt to defraud anyone and that [the] misunderstandings occurred as a result of conduct of the attorneys." (Emphasis added.) Additionally, during closing arguments, defendant's counsel argued that defendant "d[id] not obtain or exercise control over the money. No checks were ever written to Thomas Vigil. He is neither the object nor the reason for the money being given." Whether defendant was claiming that he had an "honest claim of right" to the money contradicts defendant's trial counsel's argument that he had no control over the money and may or may not be inconsistent with attorney misconduct. Thus, because defendant's defense at trial was not apparently based on the statutory defenses, we conclude no error existed which would have been plain to the trial court. Cf. State v. Bishop, 753 P.2d 439, 489 (Utah 1988) (where instruction was inconsistent with defendant's theory of case, no error in refusing instruction); State v. Pendergrass, 803 P.2d 1261, 1264-65 (Utah App. 1990) (no error when trial court refused to submit requested instruction which was inconsistent with defendant's theory of defense).

IV. CONCLUSION

We hold that the trial court correctly concluded theft by deception can occur in an adoption setting and, therefore, it properly instructed the jury on this issue. Because defendant failed to adequately brief his argument regarding the propriety of the trial court's refusal to ask potential jurors two questions submitted by defendant, we decline to address it on appeal. We conclude the trial court did not abuse its discretion in refusing to further question two jurors who had been exposed to media concerning failed adoptions, nor did it abuse its discretion in excluding Roland Oliver's testimony. We do not address defendant's claim that the trial court erred in refusing

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16. Defendant does not argue the attorneys wrongly informed him that he had "an honest claim of right to" the money, but that they instead performed inadequate services which forced him to look for a new attorney and, he reasons, new prospective adoptive parents.

to submit two of his proposed instructions to the jury because defendant failed to adequately brief the issue on appeal. Lastly, defendant's ineffective assistance of counsel claim fails because defendant has not shown how he was prejudiced by the omission of the defense instructions. Because trial counsel was advancing a different theory of defense at trial, the trial court did not commit plain error by not submitting the statutory defense instructions sua sponte. Defendant's convictions are affirmed.

James Z. Davis
Associate Presiding Judge

WE CONCUR:

Judith M. Billings, Judge

Michael J. Wilkins, Judge